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Virginia Habitual Criminal Statute.”⁴⁰⁴

He concluded the opinion stating that “[w]hether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, *W.Va. Code*, 61-11-18, -19 [1943], depends upon the classification of that crime in this State.”⁴⁰⁵

S. *Collateral Estoppel*

In the case of *State v. Porter*,⁴⁰⁶ Justice McHugh held that “[t]he principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant.”⁴⁰⁷

V. CIVIL PROCEDURE

A. *Motion to Dismiss*

Relying on the decision in *Chapman v. Kane Transfer Co.*,⁴⁰⁸ Justice McHugh held in *Dunlap v. Hinkle*⁴⁰⁹ that “[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴¹⁰

B. *Summary Judgment*

Justice McHugh took the opportunity in *Brown v. Bluefield Municipal Building Commission*⁴¹¹ to restate a rule of law fashioned in *Masinter v. Webco Co.*⁴¹² The court in *Brown* held that “[e]ven if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment.”⁴¹³

⁴⁰⁴ *Id.* at Syl. Pt. 2.

⁴⁰⁵ *Id.* at Syl. Pt. 3.

⁴⁰⁶ 392 S.E.2d 216 (W. Va. 1990).

⁴⁰⁷ *Id.* at Syl. Pt. 1.

⁴⁰⁸ 236 S.E.2d 207 (W. Va. 1977).

⁴⁰⁹ 317 S.E.2d 508 (W. Va. 1984).

⁴¹⁰ *Id.* at Syl. Pt. 2.

⁴¹¹ 280 S.E.2d 101 (W. Va. 1981).

⁴¹² 262 S.E.2d 433 (W. Va. 1980).

⁴¹³ 280 S.E.2d at Syl.

In *Community Bank and Trust, N.A. v. Keyser*,⁴¹⁴ Justice McHugh held that “[w]here the material facts surrounding a transaction are in conflict, the question of usury is for the jury.”⁴¹⁵

The court’s ruling in *Gavitt v. Swiger*⁴¹⁶ formed the basis of the holding in *Chambers v. Sovereign Coal Corp.*⁴¹⁷ Justice McHugh wrote in *Chambers* that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.”⁴¹⁸

Justice McHugh addressed the procedure for resisting summary judgment when discovery is incomplete in the case of *Crain v. Lightner*.⁴¹⁹ The court held that

[w]here a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W. Va. R. Civ. P. 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court.⁴²⁰

In *Smith v. Buege*,⁴²¹ Justice McHugh held that

[a] motion for summary judgment under W. Va. R. Civ. P. 56 must be denied when the moving party merely makes the conclusory assertion that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.⁴²²

C. *Default Judgment*

Justice McHugh addressed default judgment in *Bell v. Inland Mutual*

⁴¹⁴ 285 S.E.2d 424 (W. Va. 1981).

⁴¹⁵ *Id.* at Syl. Pt. 2.

⁴¹⁶ 248 S.E.2d 849 (W. Va. 1978).

⁴¹⁷ 295 S.E.2d 28 (W. Va. 1982).

⁴¹⁸ *Id.* at Syl.

⁴¹⁹ 364 S.E.2d 778 (W. Va. 1987).

⁴²⁰ *Id.* at Syl. Pt. 3.

⁴²¹ 387 S.E.2d 109 (W. Va. 1989).

⁴²² *Id.* at Syl. Pt. 1.

*Insurance Co.*⁴²³ He said in *Bell* that

[t]he restriction contained in W. Va. R. Civ. P. 54(c) that “[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment,” does not apply where the judgment by default has been rendered as the result of the defaulting party’s failure to obey an order of the circuit court to provide or permit discovery under W. Va. R. Civ. P. 37(b) and the defaulting party otherwise appears at the subsequent trial on the issue of damages.⁴²⁴

D. Judgment on Less Than All Claims or Parties

Justice McHugh said in *Smith v. Buege*⁴²⁵ that

[u]nder W. Va. R. Civ. P. 54(b), an order relating to less than all of multiple parties is not a final, appealable judgment unless the order expressly states that it is a final order and contains an express determination that there is no just reason for delay in final adjudication of the rights and liabilities in question.⁴²⁶

E. Service of Process

Justice McHugh held in *Sauls v. Howell*⁴²⁷ that

[a] judgment debtor is entitled to notice that suggestion proceedings under chapter 38, article 5, of the West Virginia Code have been instituted by a judgment creditor, and the judgment debtor shall be entitled pursuant to that notice to a copy of the summons issued under the provisions of *W.Va. Code*, 38-5-10 [1931], upon the suggestion.⁴²⁸

F. Personal Jurisdiction

The subject of personal jurisdiction was addressed in *Abbott v. Owens-Corning Fiberglas Corp.*⁴²⁹ Justice McHugh wrote:

⁴²³ 332 S.E.2d 127 (W. Va. 1985).

⁴²⁴ *Id.* at Syl. Pt. 8.

⁴²⁵ 387 S.E.2d 109 (W. Va. 1989).

⁴²⁶ *Id.* at Syl. Pt. 3.

⁴²⁷ 309 S.E.2d 26 (W. Va. 1983).

⁴²⁸ *Id.* at Syl. Pt. 2.

⁴²⁹ 444 S.E.2d 285 (W. Va. 1994).

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in *W.Va. Code*, 31-1-15 [1984] and *W.Va. Code*, 56-3-33 [1984]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process.⁴³⁰

Justice McHugh held in *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*⁴³¹ that

[w]hen a defendant files a motion to dismiss for lack of personal jurisdiction under W.Va.R.Civ.P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.⁴³²

G. Joinder of Parties

Justice McHugh held in *Anderson v. McDonald*⁴³³ that

[w]hen a release of liability is obtained by the representative of an insurance company and in a negligence action against the insured, the insured pleads the release as an affirmative defense pursuant to W.Va.R.Civ.P. 8(c), and the plaintiff has moved to join the insurance company as a party to the action, the trial judge may join the insurance company as a party to the action pursuant to W.Va.R.Civ.P. 20.⁴³⁴

⁴³⁰ *Id.* at Syl. Pt. 5.

⁴³¹ 497 S.E.2d 755 (W. Va. 1997).

⁴³² *Id.* at Syl. Pt. 4.

⁴³³ 289 S.E.2d 729 (W. Va. 1982).

⁴³⁴ *Id.* at Syl. Pt. 1.

H. *Laches*

Justice McHugh wrote in *Maynard v. Board of Education of Wayne County*⁴³⁵ that “[a] party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches.”⁴³⁶

Justice McHugh wrote in *State ex rel. West Virginia Department of Health and Human Resources, Child Advocate Office v. Carl Lee H.*⁴³⁷

If the reason a plaintiff delays in bringing an action for reimbursement child support is because he or she was misled by the misrepresentations of the defendant as to his or her rights to bring such action or because the delay was induced by the defendant, then the defendant may not raise the defense of laches. However, if the plaintiff does not use due diligence in bringing an action once he or she learns of the misrepresentations, then the defendant may raise the defense of laches, provided the defendant can also demonstrate that such delay has worked to his or her detriment.⁴³⁸

I. *Statute of Limitations*

Justice McHugh indicated in *State ex rel. Hardesty v. Stalnaker*⁴³⁹ that

W.Va. Code, 55-2-6 (1923), expressly provides that an action to recover “. . . upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer . . .” shall be brought within ten years next after the right to bring the same shall have accrued.⁴⁴⁰

Justice McHugh said in *Charlton v. M.P. Industries, Inc.*⁴⁴¹ that “[a] complaint which is amended to add a party, filed in compliance with Rule 5(e) of the West Virginia Rules of Civil Procedure, tolls *W.Va. Code*, 55-2-12(b) [1959], whether such complaint is amended in accordance with *W.Va.R.Civ.P.* 15(a) or

⁴³⁵ 357 S.E.2d 246 (W. Va. 1987).

⁴³⁶ *Id.* at Syl. Pt. 3.

⁴³⁷ 472 S.E.2d 815 (W. Va. 1996).

⁴³⁸ *Id.* at Syl. Pt. 6.

⁴³⁹ 280 S.E.2d 697 (W. Va. 1981).

⁴⁴⁰ *Id.* at Syl. Pt. 1 (alterations in original) (citation omitted).

⁴⁴¹ 314 S.E.2d 416 (W. Va. 1984).

such party is added in accordance with W.Va.R.Civ.P. 21.”⁴⁴²

In *Maynard v. Board of Education of Wayne County*⁴⁴³ Justice McHugh held:

It is the written employment contract, not the incorporated statutory law per se, which fixes the liability of a public employer to its public employees for the purpose of determining the applicable statute of limitations in a judicial action or proceeding for noncompliance with such contract and statutory duties incorporated therein.⁴⁴⁴

Justice McHugh examined tolling of the statute of limitations when a tortfeasor's identity is wrongfully hidden in the case of *Sattler v. Bailey*.⁴⁴⁵ The court ruled:

The general statute of limitations, *W.Va. Code*, 55-2-12, as amended, is tolled, with respect to an undiscovered wrongdoer, by virtue of the fraudulent concealment or obstruction of prosecution doctrine embodied in *W.Va. Code*, 55-2-17, as amended, when an action is brought timely against the known wrongdoer(s) and, despite the due diligence of the injured person to discover the identity of all the wrongdoers, the identity of one or more of them is hidden by words or acts constituting affirmative concealment, that is, a “cover-up.” Tolling of the statute of limitations with respect to an undiscovered wrongdoer is especially appropriate in a case in which, as part of the cover-up, the injured person is impeded in discovering the identity of the wrongdoer in question by the invocation of governmental secrecy. In a case involving a wrongdoer whose identity is affirmatively concealed, the injured person must bring his or her action against such wrongdoer within the statutory period after the injured person discovers, or reasonably should have discovered, that wrongdoer's identity.⁴⁴⁶

Justice McHugh wrote in *Hayes v. Roberts & Schaefer Co.*⁴⁴⁷ that “*W.Va. Code*, 55-2A-2 [1959] provides that ‘[t]he period of limitation applicable to a claim accruing outside of [West Virginia] shall be either that prescribed by the law of the place where the claim accrued or by the law of [West Virginia], whichever bars the

⁴⁴² *Id.* at Syl.

⁴⁴³ 357 S.E.2d 246 (W. Va. 1987).

⁴⁴⁴ *Id.* at Syl. Pt. 2.

⁴⁴⁵ 400 S.E.2d 220 (W. Va. 1990).

⁴⁴⁶ *Id.* at Syl. Pt. 3.

⁴⁴⁷ 452 S.E.2d 459 (W. Va. 1994).

claim.”⁴⁴⁸

In the case of *In re State Public Building Asbestos Litigation*,⁴⁴⁹ Justice McHugh held that “*W.Va. Code, 55-2-19 [1923]* abrogates the common law doctrine of *nullum tempus occurrit regi* thereby making statutes of limitations applicable to the State.”⁴⁵⁰

Justice McHugh wrote in *Stone v. United Engineering, a Division of Wean, Inc.*⁴⁵¹ that

W.Va. Code, 55-2-6a, limits the time period in which a suit may be filed for deficiencies in the planning, design, or supervision of construction of an improvement to real property to ten years. This period commences on the date the improvement is occupied or accepted by the owner of the real property, whichever occurs first.⁴⁵²

Justice McHugh also held:

W.Va. Code, 55-2-6a [1983] does not limit the time period in which a suit may be filed against the owner of real property for deficiencies in the planning, design, survey, observation or supervision of construction or actual construction of any improvement to real property to ten years if that owner planned, designed, surveyed, observed or supervised the construction or actually constructed that improvement to real property.⁴⁵³

Justice McHugh concluded *Stone* by holding:

When determining whether an item is an improvement to real property under *W.Va. Code, 55-2-6a [1983]*, the statute of repose, a court must consider the enhanced value created when the item is put to its intended use, the level of integration of the item within any manufacturing system, whether the item is an essential component of the system, and the item’s permanence.⁴⁵⁴

⁴⁴⁸ *Id.* at Syl. Pt. 2 (alterations in original).

⁴⁴⁹ 454 S.E.2d 413 (W. Va. 1994).

⁴⁵⁰ *Id.* at Syl. Pt. 5.

⁴⁵¹ 475 S.E.2d 439 (W. Va. 1996).

⁴⁵² *Id.* at Syl. Pt. 1. (citation omitted).

⁴⁵³ *Id.* at Syl. Pt. 2.

⁴⁵⁴ *Id.* at Syl. Pt. 3.

In *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*,⁴⁵⁵ Justice McHugh examined several issues involving the statute of limitations. The court noted initially that

because the language in W.Va. Code, 55-2-19 [1923] is unambiguous in stating that “[e]very statute of limitation, unless otherwise expressly provided, shall apply to the State[,]” the language in *Ralston v. Town of Weston*, 46 W.Va. 544, 33 S.E. 326 (1899) and *Foley v. Doddridge County Court*, 54 W.Va. 16, 46 S.E. 246 (1903) which suggests that statutes of limitation apply only when the State is acting in its private or proprietary capacity, is misleading. Thus, to the extent that *Ralston* and *Foley* imply that W.Va. Code, 55-2-19 [1923] only applies when the State is acting in its private or proprietary capacity, they are hereby modified.⁴⁵⁶

Justice McHugh next held in *Smith*:

W.Va. Code, 55-2-12(c) [1959], which clearly and unambiguously states that “[e]very personal action for which no limitation is otherwise prescribed shall be brought . . . within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative[,]” applies to civil actions brought under the Hazardous Waste Management Act found in *W.Va. Code*, 22-18-1 *et seq.*⁴⁵⁷

Justice McHugh continued:

The general one-year statute of limitations found in *W.Va. Code*, 55-2-12(c) [1959] “accrues” when any person “violates” or is “in violation” of “any provisions of [the Hazardous Waste Management Act found in *W.Va. Code*, 22-18-1 *et seq.*] or any permit, rule or order issued pursuant to [the Act].” *W.Va. Code*, 22-18-17(a)(1), 17(b) and 17(c) [1994]. Hazardous wastes which remain in the environment in amounts above the regulatory limits set pursuant to the Hazardous Waste Management Act constitute a continuing violation of the Act.⁴⁵⁸

⁴⁵⁵ 488 S.E.2d 901 (W. Va. 1997).

⁴⁵⁶ *Id.* at Syl. Pt. 4 (alterations in original).

⁴⁵⁷ *Id.* at Syl. Pt. 5 (alterations in original).

⁴⁵⁸ *Id.* at Syl. Pt. 8 (alterations in original).

Justice McHugh ruled next that

W.Va. Code, 55-2-12(c) [1959], which clearly and unambiguously states that “[e]very personal action for which no limitation is otherwise prescribed shall be brought . . . within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative[.]” applies to civil actions brought under the Water Pollution Control Act found in *W.Va. Code*, 22-11-1 *et seq.*⁴⁵⁹

In *Smith*, Justice McHugh went on to hold:

The general one-year statute of limitations found in *W.Va. Code*, 55-2-12(c) [1959] “accrues” when any person “violates any provision of [the Water Pollution Control Act, found in *W.Va. Code*, 22-11-1 *et seq.*] or of any rule or who violates any standard or order promulgated or made and entered under the provisions of [the Act]” or when a “violation occurred or is occurring” under the Act. *W.Va. Code*, 22-11-22 [1994]. Thus, any “sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source [and currently] flow[ing] into the waters of this state[.]” *W.Va. Code*, 22-11-8(b)(1) [1994], in violation of any provision of the Water Pollution Control Act constitutes a continuing violation of the Act.⁴⁶⁰

Justice McHugh concluded in *Smith* that

[w]hen a public nuisance action is brought in order to remediate a business site containing hazardous waste found in the soil and flowing into the waters of this State, the one-year statute of limitations found in *W.Va. Code*, 55-2-12(c) [1959] does not accrue until the harm or endangerment to the public health, safety and the environment is abated.⁴⁶¹

J. Selection of Jury

In *West Virginia Department of Highways v. Fisher*,⁴⁶² Justice McHugh held:

⁴⁵⁹ *Id.* at Syl. Pt. 9 (alterations in original).

⁴⁶⁰ *Smith*, 488 S.E.2d at Syl. Pt. 10 (alterations in original).

⁴⁶¹ *Id.* at Syl. Pt. 11.

⁴⁶² 289 S.E.2d 213 (W. Va. 1982).

Where a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified per se, special care should be taken by the trial judge to ascertain, pursuant to *W.Va. Code*, 56-6-12 [1931], that such prospective juror is free from bias or prejudice.⁴⁶³

Justice McHugh held in *Barker v. Benefit Trust Life Insurance Co.*⁴⁶⁴ that

[w]here a trial by jury has been secured by a party to litigation under W.Va.R.Civ.P. 38 or 39(b), a party to such litigation has a right to an impartial and unbiased jury; and, in order to insure that right, the party is entitled, in the absence of a waiver upon the record, to meaningful voir dire examination and peremptory challenges of the prospective jurors.⁴⁶⁵

K. *Class Action*

In addressing the issue of a spurious class action, Justice McHugh ruled in *Burks v. Wymer*⁴⁶⁶ that

[t]he following factors should be considered by a trial judge in deciding whether a “spurious” class action may be maintained under W.Va.R.Civ.P. 23(a)(3):

- (1) whether common questions of law or fact predominate over any questions affecting only individual members;
- (2) whether other means of adjudicating the claims and defenses are practicable or inefficient;
- (3) whether a class action offers the most appropriate means of adjudicating the claims and defenses;
- (4) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;
- (5) whether the class action involves a claim that is or has been the subject of a class action, a

⁴⁶³ *Id.* at Syl. Pt. 2.

⁴⁶⁴ 324 S.E.2d 148 (W. Va. 1984).

⁴⁶⁵ *Id.* at Syl.

⁴⁶⁶ 307 S.E.2d 647 (W. Va. 1983).

government action, or other proceeding;

- (6) whether it is desirable to bring the class action in another forum;
- (7) whether management of the class action poses unusual difficulties;
- (8) whether any conflict of laws issues involved pose unusual difficulties; and
- (9) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.⁴⁶⁷

L. *Separate Trials*

In *State ex rel. Appalachian Power Co. v. Ranson*,⁴⁶⁸ Justice McHugh outlined factors courts should consider in determining whether to consolidate separate claims for a unitary trial. The court held:

The trial court, when exercising its discretion in deciding consolidation issues under W.Va.R.Civ.P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion.⁴⁶⁹

In the case of *Anderson v. McDonald*,⁴⁷⁰ Justice McHugh held that “[i]n a negligence action, the granting of a separate trial upon the issue of the validity of a

⁴⁶⁷ *Id.* at Syl.

⁴⁶⁸ 438 S.E.2d 609 (W. Va. 1993).

⁴⁶⁹ *Id.* at Syl. Pt. 2.

⁴⁷⁰ 289 S.E.2d 729 (W. Va. 1982).

release of liability rests within the discretion of the trial judge.”⁴⁷¹

M. Involuntary Dismissal

The effects of an involuntary dismissal of an action were addressed by Justice McHugh in *Perlick & Co. v. Lakeview Creditor's Trustee Committee*.⁴⁷² The opinion stated that “[w]hen an action is dismissed pursuant to W.Va.R.Civ.P. 41(b), and that action is not reinstated within three terms after the entry of the order of dismissal, that dismissal, unless the court otherwise specified, operates as an adjudication upon the merits.”⁴⁷³

N. Jury Instructions

In *Jenrett v. Smith*,⁴⁷⁴ Justice McHugh held that “[a]n instruction is proper if it is a correct statement of the law and if there is sufficient evidence offered at trial to support it.”⁴⁷⁵

Justice McHugh held in *Brammer v. Taylor*⁴⁷⁶ that “[w]here [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so.”⁴⁷⁷

In *McGlone v. Superior Trucking Co.*,⁴⁷⁸ Justice McHugh overturned precedent that did not permit a “missing witness” jury instruction. The court held that

[t]he unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the “missing” witness would, if he or she had been called, have been adverse to the party failing to call such witness. To the extent that syllabus point 1 of *Vandervort v. Fouse*, 52 W.Va. 214, 43 S.E. 112 (1902), syllabus point 5 of *Garber v. Blatchley*, 51 W.Va. 147, 41 S.E. 222 (1902), and syllabus point 3 of *Union Trust Co. v. McClellan*, 40 W.Va. 405, 21 S.E. 1025 (1895), are inconsistent

⁴⁷¹ *Id.* at Syl. Pt. 2 (citation omitted).

⁴⁷² 298 S.E.2d 228 (W. Va. 1982).

⁴⁷³ *Id.* at Syl. Pt. 3.

⁴⁷⁴ 315 S.E.2d 583 (W. Va. 1983).

⁴⁷⁵ *Id.* at Syl. Pt. 5.

⁴⁷⁶ 338 S.E.2d 207 (W. Va. 1985).

⁴⁷⁷ *Id.* at Syl. Pt. 2 (alteration in original).

⁴⁷⁸ 363 S.E.2d 736 (W. Va. 1987).

with this opinion, they are hereby overruled.⁴⁷⁹

The case of *Valentine v. Wheeling Electric Co.*⁴⁸⁰ called upon Justice McHugh to determine whether a jury instruction on public nuisance was appropriate. Justice McHugh held that

[o]bstructions within the meaning of *W.Va. Code*, 17-16-1, as amended, include utility poles erected on a public road in such a way that they interfere with the use of or prevent the easy, safe and convenient use of such public road for public travel. Utility poles erected in such a way are public nuisances within the contemplation of *W.Va. Code*, 17-16-1, as amended. Therefore, it is not error for a trial court to give an instruction stating that to be a public nuisance, a utility pole must be erected in such a way that it prevents the easy, safe and convenient use of a public road for public travel.⁴⁸¹

O. *Judgment Notwithstanding the Verdict*

Justice McHugh said in *McClung v. Marion County Commission*⁴⁸² that “[i]n a case where the evidence is such that the jury could have properly found for either party upon the factual issues, a motion for judgment notwithstanding the verdict should not be granted.”⁴⁸³ The court also held:

Where the trial court granted the motion for judgment notwithstanding the verdict, but failed to rule on the motion for a new trial, and the appellate court reverses the entry of the judgment notwithstanding the verdict, the appellate court has three dispositional alternatives. The appellate court may (1) reinstate the jury’s verdict and enter judgment thereon; or (2) order a new trial; or (3) remand the case to the trial court for consideration of the motion for a new trial.⁴⁸⁴

P. *New Trial*

The issue of granting a new trial based upon juror disqualification or misconduct was taken up by Justice McHugh in *McGlone v. Superior Trucking*

⁴⁷⁹ *Id.* at Syl. Pt. 3.

⁴⁸⁰ 376 S.E.2d 588 (W. Va. 1988).

⁴⁸¹ *Id.* at Syl. Pt. 1.

⁴⁸² 360 S.E.2d 221 (W. Va. 1987).

⁴⁸³ *Id.* at Syl. Pt. 7.

⁴⁸⁴ *Id.* at Syl. Pt. 9.

Co.⁴⁸⁵ The opinion held:

Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it is a matter which could not have been remedied by calling attention to it at the time it was first discovered.⁴⁸⁶

Justice McHugh held in the case of *In re State Public Building Asbestos Litigation*⁴⁸⁷ that

[a] motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.⁴⁸⁸

Justice McHugh was asked in *Maynard v. Adkins*⁴⁸⁹ to determine whether the trial court was correct in awarding a new trial on the basis of an alleged conflict of interest by counsel for plaintiff. The court held:

Where an attorney, as co-counsel, represented a plaintiff in a personal injury action and, in an unrelated matter, represented the personal representative of an estate of which the defendant was a beneficiary, the trial court abused its discretion in granting a new trial for the defendant upon those circumstances, where (1) the defendant attended neither the trial nor any pretrial proceedings

⁴⁸⁵ 363 S.E.2d 736 (W. Va. 1987).

⁴⁸⁶ *Id.* at Syl. Pt. 5 (citation omitted).

⁴⁸⁷ 454 S.E.2d 413 (W. Va. 1994).

⁴⁸⁸ *Id.* at Syl. Pt. 3.

⁴⁸⁹ 457 S.E.2d 133 (W. Va. 1995).

with regard to the personal injury action and (2) the record revealed no discussions or meetings between the attorney and the defendant with regard to either the personal injury action or the estate matter.⁴⁹⁰

Q. Relief from Final Judgment

Justice McHugh carved out the contours of relief from a final judgment in the case of *N.C. v. W.R.C.*⁴⁹¹ He initially held that “[i]n addition to a motion for relief from a final judgment, order or proceeding pursuant to the reasons set forth in W.Va.R.Civ.P. 60(b)(1) through (5), the rule specifically provides that a party may obtain relief from a final judgment, order or proceeding through an independent action.”⁴⁹²

Justice McHugh next held that “[t]he definition of an independent action, as contemplated by W.Va.R.Civ.P. 60(b), is an equitable action that does not relitigate the issues of the final judgment, order or proceeding from which relief is sought and is one that is limited to special circumstances.”⁴⁹³

Justice McHugh concluded:

In order to obtain relief from a final judgment, order or proceeding through an independent action, the independent action must contain the following elements: (1) the final judgment, order or proceeding from which relief is sought must be one that, in equity and good conscience, should not be enforced; (2) the party seeking relief should have a good defense to the cause of action upon which the final judgment, order or proceeding is based; (3) there must have been fraud, accident or mistake that prevented the party seeking relief from obtaining the benefit of his defense; (4) there must be absence of fault or negligence on the part of the party seeking relief; and (5) there must be no adequate legal remedy.⁴⁹⁴

Justice McHugh indicated in *Cruciotti v. McNeel*⁴⁹⁵ that “Rule 60(b) of the West Virginia Rules of Civil Procedure should be liberally construed to accomplish justice.”⁴⁹⁶

Justice McHugh outlined the procedural methods for challenging a final

⁴⁹⁰ *Id.* at Syl. Pt. 3.

⁴⁹¹ 317 S.E.2d 793 (W. Va. 1984).

⁴⁹² *Id.* at Syl. Pt. 1.

⁴⁹³ *Id.* at Syl. Pt. 2.

⁴⁹⁴ *Id.* at Syl. Pt. 3.

⁴⁹⁵ 396 S.E.2d 191 (W. Va. 1990).

⁴⁹⁶ *Id.* at Syl. Pt. 5.

order in *State ex rel. McDowell County Sheriff's Department v. Stephens*.⁴⁹⁷ He wrote:

A party whose case is dismissed under Rule 37 of the West Virginia Rules of Civil Procedure may appeal the dismissal order, pursuant to *W.Va. Code*, 58-5-4 [1990] and West Virginia Rules of Appellate Procedure 3. In lieu of an appeal, the party may file a motion to alter or amend the judgment no later than ten days after the judgment is entered, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. If such motion is not timely filed, a party, under appropriate circumstances, may seek relief from a final judgment, order or proceeding for the reasons set forth in Rule 60(b) of the West Virginia Rules of Civil Procedure.⁴⁹⁸

Justice McHugh wrote in *Nancy Darlene M. v. James Lee M.*⁴⁹⁹ that

Rule 60(b)(5) of the West Virginia Rules of Civil Procedure, which permits relief from a judgment where “it is no longer equitable that the judgment should have prospective application,” is ordinarily limited to instances where the controlling circumstances of the action have changed subsequent to the entry of the judgment and is not to be invoked as a substitute for an appeal; in considering a motion for relief under Rule 60(b)(5), a circuit court should proceed with caution.⁵⁰⁰

R. *Motion in Limine*

Justice McHugh stated in *Daniel v. Stevens*⁵⁰¹ that “[n]otice of a written motion in limine presented during a hearing or trial need not be served in accordance with Rule 6(d) of the West Virginia Rules of Civil Procedure.”⁵⁰²

S. *Discovery Sanctions*

Justice McHugh was called upon to outline the contours of imposing a sanction for violating a trial court’s discovery order in *Bell v. Inland Mutual*

⁴⁹⁷ 452 S.E.2d 432 (W. Va. 1994).

⁴⁹⁸ *Id.* at Syl. Pt. 2.

⁴⁹⁹ 464 S.E.2d 795 (W. Va. 1995).

⁵⁰⁰ *Id.* at Syl. Pt. 2.

⁵⁰¹ 394 S.E.2d 79 (W. Va. 1990).

⁵⁰² *Id.* at Syl. Pt. 4.

*Insurance Co.*⁵⁰³ The opinion noted initially:

Where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W.Va.R.Civ.P. 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions.⁵⁰⁴

Justice McHugh then held:

Although the party seeking sanctions under W.Va.R.Civ.P. 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery, once established, the burden is upon the disobedient party to avoid the sanctions sought under W.Va.R.Civ.P. 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust.⁵⁰⁵

Justice McHugh concluded in *Bell* that

[t]he striking of pleadings and the rendering of judgment by default against a party as sanctions under W.Va.R.Civ.P. 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just.⁵⁰⁶

Justice McHugh addressed the issue of being held in contempt of court as a sanction for violating a discovery order in the case of *Vincent v. Preiser*.⁵⁰⁷ The court stated that

[a] movant for a protective order under W.Va.R.Civ.P. 26(c)(4) may be held in contempt of court, under W.Va.R.Civ.P. 37(b)(2)(D), for failure to comply with court orders compelling discovery, where a fair reading of the orders compelling discovery as well as the circumstances, including repeated oral rulings of the

⁵⁰³ 332 S.E.2d 127 (W. Va. 1985).

⁵⁰⁴ *Id.* at Syl. Pt. 4.

⁵⁰⁵ *Id.* at Syl. Pt. 3.

⁵⁰⁶ *Id.* at Syl. Pt. 2.

⁵⁰⁷ 338 S.E.2d 398 (W. Va. 1985).

court, indicate that the Rule 26(c)(4) motion(s) have been denied. The Rule 26(c)(4) movant in such a case, by filing such motion(s), does not, in effect, grant himself a protective order until the court formally denies the motion(s) for protective order.⁵⁰⁸

T. Depositing Money with Court

Justice McHugh stated in *Arcuri v. Great American Insurance Co.*⁵⁰⁹ that

W.Va.R.Civ.P. 67 contemplates that a deposit or payment into court be with leave of court and that the money ordered deposited be subject to the exclusive control of the court. The party making the deposit must surrender all control over the money to the court, not to other persons claiming an interest in the money.⁵¹⁰

U. Forum Non Conveniens

Justice McHugh indicated in *Gardner v. Norfolk & Western Railroad Co.*⁵¹¹ that

[t]he common-law principle of forum non conveniens and the similar state statute on removal of civil proceedings, W.Va. Code, 56-9-1 [1939], are not applicable to actions brought in the courts of this State under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as amended, in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of W.Va. Const. art. III, §. 17 providing access to the courts of this State.⁵¹²

In *Abbott v. Owens-Corning Fiberglas Corp.*⁵¹³ Justice McHugh elaborated on the doctrine of forum non conveniens. Justice McHugh wrote:

The framework to analyze whether the common law doctrine of forum non conveniens is applicable has been set forth in *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 400 S.E.2d 239 (1990). This framework ensures that the doctrine of forum non conveniens is applied flexibly and on a case-by-case basis. A

⁵⁰⁸ *Id.* at Syl. Pt. 1.

⁵⁰⁹ 342 S.E.2d 177 (W. Va. 1986).

⁵¹⁰ *Id.* at Syl. Pt. 4.

⁵¹¹ 372 S.E.2d 786 (W. Va. 1988).

⁵¹² *Id.* at Syl.

⁵¹³ 444 S.E.2d 285 (W. Va. 1994).

presumption that the forum is convenient when a defendant is a resident of that forum would undercut the flexibility of the doctrine.⁵¹⁴

V. *Venue*

Justice McHugh addressed the issue of venue in the context of a legal malpractice action in the case of *McGuire v. Fitzsimmons*.⁵¹⁵ The court held that

[u]nder *W.Va. Code*, 56-1-1(a)(1) [1986] when determining venue in a legal malpractice case, a circuit court can find venue proper based on where either the defendants reside or the cause of action for the legal malpractice suit arose. The circuit court may find venue to be proper in more than one county. Venue based on where the cause of action for the legal malpractice suit arose is proper in the following counties: (1) where the attorney's employment was contracted, that is, where the duty came into existence; or (2) where the breach or violation of the duty occurred; or (3) where the manifestation of the breach—substantial damage—occurred.⁵¹⁶

W. *Res Judicata*

In *Sattler v. Bailey*,⁵¹⁷ Justice McHugh addressed the application of res judicata to a state cause of action dismissed in federal court. He held that

[w]hen the federal claim in a federal action is dismissed by the federal court prior to trial, and, therefore, it is clear that the federal court would have declined to exercise jurisdiction of a related state claim which could have been raised in the federal action pursuant to the “pendent” jurisdiction of the federal court, a subsequent action in a state court on the state claim which would have been dismissed, without prejudice, in the prior federal action is not barred by the doctrine of res judicata.⁵¹⁸

X. *Attorney Conflict of Interest*

Justice McHugh addressed the issue of appearance of conflict of interest

⁵¹⁴ *Id.* at Syl. Pt. 3.

⁵¹⁵ 475 S.E.2d 132 (W. Va. 1996).

⁵¹⁶ *Id.* at Syl.

⁵¹⁷ 400 S.E.2d 220 (W. Va. 1990).

⁵¹⁸ *Id.* at Syl. Pt. 2.

by an attorney in the case of *Garlow v. Zakaib*.⁵¹⁹ The court held that

[a] circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.⁵²⁰

Justice McHugh also stated in *Garlow* that

[b]efore a circuit court disqualifies a lawyer in a case because the lawyer's representation may conflict with the Rules of Professional Conduct, a record must be made so that the circuit court may determine whether disqualification is proper. Furthermore, this Court will not review a circuit court's order disqualifying a lawyer unless the circuit court's order is based upon an adequately developed record. In the alternative, if the circuit court's order disqualifying a lawyer is based upon an inadequately developed record, this Court, under appropriate circumstances, may remand a case to the circuit court for development of an adequate record.⁵²¹

Y. *Guardian Ad Litem for Incarcerated Party*

Justice McHugh addressed the role of trial courts when a guardian ad litem fails to appear in an action on behalf of an incarcerated party in the case of *Jackson General Hospital v. Davis*.⁵²² Justice McHugh held:

Where a guardian ad litem who has been appointed, pursuant to W.Va.R.Civ.P. 17(c), to defend an incarcerated convict in a civil action, and who has been properly served with process concerning the action, fails to appear, plead or otherwise defend, the circuit court, prior to entry of a default judgment, has a duty, under W.Va.R.Civ.P. 55(b), to make an investigation or conduct a hearing upon the record concerning the guardian ad litem's representation of the incarcerated convict and, in addition, may order that the guardian ad litem be served with written notice of

⁵¹⁹ 413 S.E.2d 112 (W. Va. 1991).

⁵²⁰ *Id.* at Syl. Pt. 1.

⁵²¹ *Id.* at Syl. Pt. 5.

⁵²² 464 S.E.2d 593 (W. Va. 1995).

the application for default judgment, as if the guardian ad litem had appeared in the action.⁵²³

Z. *Guardian Ad Litem for Incompetent Party*

Justice McHugh was concerned with appointment of a guardian ad litem for an incompetent person in the case of *State ex rel. McMahon v. Hamilton*.⁵²⁴ Justice McHugh noted as a general matter that

[u]nder W.Va.R.Civ.P. 17(c), whenever an infant, incompetent person, or convict has a duly qualified representative, such as a guardian, curator, committee or other like fiduciary, such representative may sue or defend on behalf of the infant, incompetent person, or convict. If a person under any disability does not have a duly qualified representative he may sue by his next friend. The court shall appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or the court shall make such other order as it deems proper for the protection of any person under disability.⁵²⁵

The court next held that

[w]here a substantial question exists regarding the mental competency of a party not otherwise represented to proceed with the litigation presently before the court, the court may, where there is good cause shown, require the party to undergo a mental examination in order to determine whether a guardian ad litem should be appointed to protect the party's interests pursuant to West Virginia Rule of Civil Procedure 17(c).⁵²⁶

Justice McHugh concluded:

When a court orders a party to undergo a mental examination by a psychiatrist to determine whether a guardian ad litem should be appointed to protect the party's interests under West Virginia Rule of Civil Procedure 17(c), the court shall receive a copy of the appointed psychiatrist's report of such examination. Pursuant to *W.Va. Code*, 27-3-1(b)(3) [1977], the court may release such report only if it finds that it is sufficiently relevant to a proceeding

523 *Id.* at Syl. Pt. 4.

524 482 S.E.2d 192 (W. Va. 1996).

525 *Id.* at Syl. Pt. 3.

526 *Id.* at Syl. Pt. 4.

before the court to outweigh the importance of maintaining the confidentiality established by W.Va. Code, 27-3-1(a) [1977].⁵²⁷

VI. DOMESTIC RELATIONS

A. *Civil Child Abuse and Neglect*

The case of *In Interest of S.C.*⁵²⁸ required Justice McHugh to examine issues regarding the burden of proof in civil child abuse and neglect proceedings. Justice McHugh held that

W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove “conditions existing at the time of the filing of the petition . . . by clear and convincing proof.” The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.⁵²⁹

Justice McHugh concluded in *In Interest of S.C.* that “[e]ven when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings.”⁵³⁰

Justice McHugh addressed terminating parental rights due to neglect or abuse in *Interest of Darla B.*⁵³¹ The court held initially that

[t]he decision of a circuit court terminating the rights of parents to their child pursuant to *W.Va. Code*, 49-6-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life-threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found “compelling circumstances” for the termination of parental rights.⁵³²

Justice McHugh concluded in *Darla B.* that

⁵²⁷ *Id.* at Syl. Pt. 6.

⁵²⁸ 284 S.E.2d 867 (W. Va. 1981).

⁵²⁹ *Id.* at Syl. Pt. 1.

⁵³⁰ *Id.* at Syl. Pt. 2.

⁵³¹ 331 S.E.2d 868 (W. Va. 1985).

⁵³² *Id.* at Syl. Pt. 2.